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No. 03-1447

Supreme Court, U.S.
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In The

Supreme Court of the United States

JANE ROE, II,

Petitioner,

vs.

AWARE WOMAN CENTER FOR CHOICE, INC., a Florida corporation, EDWARD W. WINDLE, JR., PATRICIA B. WINDLE, and WILLIAM P. EGHERMAN, MD.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

MICHAEL R. D'LUGO
Counsel of Record
WICKER, SMITH, O'HARA, MCCOY, GRAHAM & FORD, P.A.
Attorney for William P. Egherman, M.D.
Post Office Box 2753
Orlando, FL 32802-2753
407.843.3939

ANDREW W. MENYHART
ANDREW W. MENYHART, P.A.
Attorney for Aware Woman Center for Choice, Inc., Edward W. Windle, Jr., and Patricia B. Windle
Post Office Box 541739
Merritt Island, FL 32954-1739
321.453.2221

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STATEMENT OF THE CASE AND OF THE FACTS

The above captioned proceeding is an effort by the Petitioner, Jane Roe, II ("Ms. Roe") to have this Court review the opinion rendered by the United States Circuit Court of Appeals for the Eleventh Circuit, which had the effect of affirming the District Court's granting of final summary judgment in favor of the Respondents, Aware Woman Center for Choice, Inc., Edward W. Windle, Jr., Patricia B. Windle, and William P. Egherman, M.D. (the "Respondents").

The Respondents take issue with virtually every statement made within the Petitioner's factual background portion of the Statement of the Case. Practically every statement of "fact" is either grossly exaggerated or simply untrue. A more balanced and accurate depiction of the factual background underlying Ms. Roe's claim can be found in either the opinion of the United States District Court for the Middle District of Florida, Orlando Division, found in the Petitioner's Appendix A, or in the opinion of the United States Court of Appeals for the Eleventh Circuit filed on January 23, 2004 at the Petitioner's Appendix C.

Dr. Egherman is an abortion provider who was working at the Aware Woman Center for Choice on March 29, 1997, and is the individual who performed the abortion on Ms. Roe that is the subject of this litigation. (Petitioner's Appendix, 3a). The Aware Woman Center for Choice is an abortion clinic located in Melbourne, Florida. (2a). Patricia B. Windle and Edward W. Windle, Jr., are the co-owners of the Aware Woman facility.

On March 29, 1997, Ms. Roe presented to the Aware Woman Center for the purpose of obtaining an abortion,

the fourth of her life. (2a-3a). Ms. Roe was called into the operating suite and asked to lie down on the operating table. (3a). Dr. Egherman administered inhalational nitrous oxide as a sedative. (3a). Dr. Egherman focused on the medical procedure to be performed, because there was a patient advocate in the operating room whose only responsibility was to ensure Ms. Roe's well being. (3a).

After the procedure began Ms. Roe complained of intense pain. (4a). Subsequent medical treatment confirmed that her complaint of pain was because Dr. Egherman had perforated her uterus and lacerated her colon. (4a). Dr. Egherman was not certain what caused the initial perforation of the uterus, although the laceration of the colon appeared to be inflicted when the suction curette passed through the aperture in her uterus. (4a). In the alternative, the laceration could have been caused through the use of heavy bear forceps. (4a).

At some point during the procedure, because of the intense pain that she was suffering, Ms. Roe ordered Dr. Egherman to stop the procedure. (4a). Dr. Egherman temporarily withdrew when told to do so by Ms. Roe, however he then proceeded with invasive medical treatment despite her protests. (5a). Dr. Egherman realized as soon as Ms. Roe had reported this intense, atypical pain that a serious complication had occurred. (5a). At this point, Dr. Egherman abandoned the abortion procedure, and shifted into a diagnostic mode in order to determine precisely what was wrong with Ms. Roe, and whether her life was in jeopardy. (5a).

Ms. Roe refused to assent to any additional treatment, and demanded to be allowed to leave. (5a). At this point, Dr. Egherman ordered the Aware Woman staff to restrain

Ms. Roe so that he could treat her. (5a). Dr. Egherman felt that it was medically imperative to ascertain the nature of Ms. Roe's complication, because depending upon the precise nature of the complication, Ms. Roe's life could have been in danger. (5a). Based upon his diagnostic efforts, Dr. Egherman concluded that he had perforated Ms. Roe's uterus, she required emergency transportation to a hospital via ambulance, and she needed to be stabilized. (6a). Dr. Egherman then proceeded to stabilize Ms. Roe, and she was transferred to the hospital emergency room. (6a). Before Ms. Roe arrived at the hospital emergency room, Dr. Egherman contacted the attending physician to apprise that physician of Ms. Roe's status. (6a). He also contacted the on-call obstetrical specialist who ultimately removed Ms. Roe's fetus and performed surgery to repair her injuries. (6a). Based upon these facts, Ms. Roe sued the Respondents under the provisions of the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248.

Ms. Roe's statement of the procedural aspects of the proceedings below, leading to the filing of the instant Petition for Writ of *Certiorari*, is accurate, and the Respondents do not take any exception to this particular portion of Ms. Roe's Petition.

SUMMARY OF THE ARGUMENT

Ms. Roe has argued that this Court should grant her Petition for Writ of *Certiorari* because the opinion of the Eleventh Circuit Court of Appeals violates a woman's absolute right to refuse an abortion. However, as is the case throughout the Petition for Writ of *Certiorari*, the legal arguments the Petitioner has raised are completely

disconnected from the actual facts of the underlying case. Here, a medical complication developed. Dr. Egherman's unrebutted testimony was that his actions at this point were solely motivated by a desire to protect her life, health and safety.

Ms. Roe's second issue in her Petition for Writ of *Certiorari* is that FACE protects the right of a woman to refuse an abortion. While this is certainly correct, there is no relationship between this legal position and the facts of the underlying claim.

Finally, Ms. Roe takes the position that a forced abortion is a violation of FACE as a matter of law. As a principle of law, this statement has merit; however, the record in this cause is completely devoid of any factual support for the contention that Ms. Roe was the victim of a forced abortion. Therefore, none of the issues Ms. Roe raises in her Petition for Writ of *Certiorari* warrant a full review by this Court, and therefore the Petition must be denied.

LEGAL ARGUMENT

I. WHILE A WOMAN HAS AN ABSOLUTE RIGHT TO REFUSE AN ABORTION, ONCE A VOLUNTARY PROCEDURE BEGINS AND A COMPLICATION DEVELOPS, A PHYSICIAN HAS A MEDICAL AND ETHICAL DUTY TO PRESERVE HIS PATIENT'S LIFE, HEALTH AND SAFETY.

Ms. Roe's Petition for Writ of *Certiorari* sets forth three issues that Ms. Roe believes this Court needs to

consider in ruling on whether to grant the Petition for Writ of *Certiorari*. Those issues are phrased as follows:

1. A pregnant woman has the absolute right to refuse an abortion.

2. The right of a pregnant woman to refuse an abortion in an abortion clinic is protected by the Freedom of Access to Clinic Entrances Act.

3. A forced abortion done by an abortionist in an abortion clinic is a violation of Freedom of Access to Clinic Entrances Act as a matter of law.

The first issue that Ms. Roe raises is that a woman has an absolute right to refuse an abortion. While this is certainly true in almost any conceivable context, the peculiar facts of the instant litigation demonstrate the incompatibility of this bright line rule of law in all situations. The point at which Ms. Roe's logic breaks down is when one considers that Ms. Roe's position is that a woman has an absolute right to refuse an abortion, which automatically assumes that the woman has the cognitive ability to accept or refuse anything under the circumstances. Here, Ms. Roe was simply not in a position to make a rational decision because of several factors. First, she was under inhalational nitrous oxide sedation, the purpose of which is to dull the senses, and the effect of which is to impair the mind's ability to generate coherent, rational thoughts. Second, the procedure was already under way, and was compounded by the complications caused by the perforation of Ms. Roe's uterus and the laceration of her colon. Lastly, the ability of the human mind to make a rational decision under these circumstances is not absolute, and therefore Ms. Roe's proposed rule of law is not applicable to the facts of the instant case.

What occurred on March 29, 1997, and what is clear from the record as summarized in both the District Court's and the Eleventh Circuit Court's opinions, is that Dr. Egherman perforated Ms. Roe's uterus and lacerated her colon, immediately placing Ms. Roe's life in jeopardy. In the instant case, the circumstances compelled Dr. Egherman to do that which was most appropriate in order to protect Ms. Roe's health, and potentially to salvage her life. Stabilizing Ms. Roe, preparing her for transfer to an emergency facility, and then effectuating that transfer were literally the only options available for Dr. Egherman once he realized the injuries that had been caused to Ms. Roe.

Dr. Egherman had passed that "point of no return" when the injury occurred, and therefore he was not in any position to simply stop the procedure and allow Ms. Roe to leave the facility. Rather, his only choice was to take all steps necessary in order to preserve Ms. Roe's life and health. This is precisely what he did. Therefore, under the circumstances of this case, it cannot be said that the Respondents violated Ms. Roe's absolute right to refuse an abortion.

In support of this argument, Ms. Roe points to dicta from this Court's previous decisions that have absolutely no application to the facts of the instant lawsuit. It should be beyond discussion that the state does not have a right to compel a woman to undergo an unwanted abortion procedure. However, this fact has no bearing on the instant litigation. Here, Ms. Roe voluntarily presented to the Aware Woman Clinic to undergo an abortion procedure. During the course of the procedure her uterus was perforated and her colon was lacerated, after which Dr. Egherman did everything within his power to protect Ms.

Roe's life and health. Therefore, Ms. Roe's first issue in her Petition for Writ of *Certiorari* is without merit.

II. THE OPINION OF THE ELEVENTH CIRCUIT DOES NOT STAND FOR THE SWEEPING PROPOSITION THE PETITIONER ASSERTS, AS SUMMARY JUDGMENT WAS GRANTED IN FAVOR OF THE RESPONDENTS IN LIGHT OF THE ABSENCE OF DISPUTED FACTS, WHICH WAS THE PRODUCT OF MINIMAL DISCOVERY.

Likewise, Ms. Roe's second issue in her Petition for Writ of *Certiorari*, that the right of a woman to refuse an abortion in an abortion clinic is protected under FACE, is similarly without merit under the facts of this case. Ms. Roe has interpreted the opinion of the Eleventh Circuit Court of Appeal (Appendix C) to mean that there is an automatic loophole in FACE, in which a physician is essentially able to "opt out" of the application of FACE to suit his own evil purposes. Of course, this position is completely at odds with the facts elicited during the proceedings below.

The procedural history of the instant matter includes the granting of summary judgment on behalf of all Respondents, which was affirmed by the Eleventh Circuit Court of Appeals. The reasoning behind the entry of summary judgment in favor of all of the Respondents was that there was no disputed issue as to any material fact, and that the Respondents were entitled to entry of summary judgment in their favor as a matter of law. One of the reasons that there were no disputed issues of material fact is that Ms. Roe only took four (4) depositions, those of Mrs. Windle, Mr. Windle, Dr. Egherman, and the Respondents' retained expert, David A. Grimes, M.D. Ms. Roe never attempted to

take the deposition of any staff member of the Aware Woman Clinic. Ms. Roe also failed to retain the services of an expert in the fields of abortion or emergency medicine who could comment on Dr. Egherman's testimony regarding his motivation behind stopping the abortion procedure, moving into diagnostic mode, stabilizing Ms. Roe, and transferring her to an emergency facility.

In the absence of any such testimony, the District Court had no choice but to grant the Respondents' Motions for Summary Judgment. There simply was no contradictory testimony for the District Court to consider. Therefore, the opinion of the Eleventh Circuit Court of Appeals can hardly be read as giving abortion providers free reign to violate FACE on a whim by making their own self-serving statement that the motivation to act was to save the patient's life. Instead, the opinion of the Eleventh Circuit Court of Appeals stands for the proposition that under the facts of this case, given the limited record evidence that was submitted to the District Court, there was uncontroverted testimony that none of the Respondents were motivated by a desire to prevent Ms. Roe from obtaining reproductive health services elsewhere. This is an essential element of a cause of action under FACE, and the failure of Ms. Roe to establish any disputed issue of material fact as to this element was fatal to her claim. However, given the peculiar, factual, and procedural background in this case, including the complete absence of any effort by Ms. Roe to create a record that would establish a disputed issue of fact, the Eleventh Circuit Court of Appeals' opinion does not stand for the sweeping rule of law that Ms. Roe suggests, and the need for this Court to provide full review of the Eleventh Circuit Court's decision is unwarranted.

III. MS. ROE WAS NOT THE VICTIM OF A FORCED ABORTION, AND THEREFORE THE ISSUE OF WHETHER A FORCED ABORTION CONSTITUTES A VIOLATION OF FACE AS A MATTER OF LAW IS NOT BEFORE THIS COURT.

The third issue that Ms. Roe raises in her Petition for Writ of *Certiorari* is similarly detached from the facts of the underlying claim which the District Court considered in ruling on the Respondents' Motions for Summary Judgment. Ms. Roe takes the position that a forced abortion constitutes a violation of FACE as a matter of law. Indeed, this is another rule of law that makes abundant sense, but one which has no application to the facts of the instant litigation. Ms. Roe has used the term "forced abortion" liberally throughout the course of the underlying proceedings, and obviously continues to do so before this Court. However, there is absolutely no record evidence to support the contention that Ms. Roe was the victim of a forced abortion in this case.

The District Court emphatically rejected Ms. Roe's contention that Dr. Egherman performed a forced abortion on her. In fact, the District Court stated that the "allegation [that Dr. Egherman performed a forced abortion on Ms. Roe] relies on what can only be described as willful mischaracterization of Dr. Egherman's deposition testimony." (10a). The District Court went on to state: "Plaintiff's deliberate misuse of Dr. Egherman's testimony to portray him as someone trying to perform a forced abortion is not only factually incorrect, but also is the sort of vexatious and baseless allegation that verges precipitously in sanctionable bad faith." (11a).

Thus, the record evidence the District Court considered, and that which the Eleventh Circuit Court of Appeals considered in its *de novo* review of the order granting the Respondents' Motions for Summary Judgment, unequivocally establishes that Ms. Roe was not the victim of a forced abortion. As such, the legal principle of whether a forced abortion constitutes a violation of FACE as a matter of law is not at issue in this litigation, and cannot form the basis of an order granting Ms. Roe's Petition for Writ of *Certiorari*.

It should also be noted that in her Appendix to the Petition for Writ of *Certiorari*, Ms. Roe has provided this Court with what Ms. Roe has identified as: "forced abortion information." Ms. Roe's decision to submit these materials arguably constitutes a violation of Supreme Court Rule 24(6), which provides: "A brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph." The "forced abortion materials" that Ms. Roe has submitted to this Court are irrelevant, immaterial, and arguably scandalous, and should be stricken from this record.

CONCLUSION

For the reasons stated herein, the Respondents respectfully request that this Court deny the Petitioner's Petition for Writ of *Certiorari*.

Respectfully submitted,

MICHAEL R. D'LUGO
Counsel of Record
WICKER, SMITH, O'HARA, MCCOY, GRAHAM & FORD, P.A.
Attorney for William P. Egherman, M.D.
Post Office Box 2753
Orlando, FL 32802-2753
407.843.3939

ANDREW W. MENYHART
ANDREW W. MENYHART, P.A.
Attorney for Aware Woman Center for Choice, Inc., Edward W. Windle, Jr., and Patricia B. Windle
Post Office Box 541739
Merritt Island, FL 32954-1739
321.453.2221